



## University of Arkansas at Little Rock Law Review

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Volume 8 | Issue 3

Article 4


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1985

### Criminal Procedure—Exclusionary Rule—No Good Faith Exception to the Arkansas Rules of Criminal Procedure

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#### Recommended Citation

Dale Scroggins, *Criminal Procedure—Exclusionary Rule—No Good Faith Exception to the Arkansas Rules of Criminal Procedure*, 8 U. ARK. LITTLE ROCK L. REV. 513 (1986).

Available at: <https://lawrepository.ualr.edu/lawreview/vol8/iss3/4>

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CRIMINAL PROCEDURE—EXCLUSIONARY RULE—NO GOOD FAITH EXCEPTION TO THE ARKANSAS RULES OF CRIMINAL PROCEDURE—YET. *State v. Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985).

Officer Jerry Ridgell of the Stuttgart Police Department observed Charles Ray Anderson, Jr., making a drug sale on the afternoon of April 12, 1983. At 2:00 the next morning, Officer Ridgell appeared before the circuit judge to request a warrant to search Anderson's house. Officer Ridgell offered no affidavit to support issuance of the warrant, but instead offered oral testimony. His oral testimony was not recorded.

The circuit judge issued a warrant for the search of Anderson's house. At 2:30, Anderson was arrested and his house and vehicle searched. The police found marijuana and drug paraphernalia. Anderson was charged with several crimes, but all the charges were later dismissed except for possession of marijuana with intent to deliver.<sup>1</sup>

At trial, Anderson moved to suppress the evidence seized in the search of his house and vehicle. His motion was granted as to the search of his vehicle, but denied as to the search of his house. Anderson was found guilty of possession of marijuana, a misdemeanor, and sentenced to one year in jail and fined \$1,000.<sup>2</sup> Anderson appealed to the Arkansas Court of Appeals, arguing that the drug paraphernalia should not have been admitted over an objection to its relevance and that the search warrant was improperly and illegally authorized. The court of appeals upheld the trial court on the issue of the admissibility of the paraphernalia but reversed on the issue of the validity of the search warrant.<sup>3</sup>

After Anderson and the state had submitted their briefs to the court of appeals, but before the court rendered a decision, the United States Supreme Court decided *United States v. Leon*<sup>4</sup> and *Massachusetts v. Sheppard*,<sup>5</sup> which held that evidence seized under a defective search warrant should not be suppressed at trial if the police acted in good faith in procuring and executing the warrant. Neither party in *Anderson* had raised the issue of the officer's good faith.<sup>6</sup>

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1. *Anderson v. State*, 13 Ark. App. 68, 69, 679 S.W.2d 806, 807 (1984).

2. *Id.*

3. *Id.*

4. 104 S. Ct. 3405 (1984).

5. 104 S. Ct. 3424 (1984).

6. *Anderson v. State*, 13 Ark. App. at 71, 679 S.W.2d at 808 (Cracraft, C. J., concurring).

The Arkansas Supreme Court granted a writ of certiorari for the purposes of reconciling Arkansas law with *Leon* and *Sheppard* and reviewing the Arkansas Rules of Criminal Procedure.<sup>7</sup> After hearing oral arguments, which by that time addressed the good faith issue, the supreme court held that the search warrant did not comply with the Arkansas Rules of Criminal Procedure and was thus invalid. Therefore, the resulting search was unreasonable and the evidence seized through execution of the invalid warrant should not have been admitted at trial. The good faith exception to the exclusionary rule did not relieve the police of the burden of compliance with the Arkansas Rules of Criminal Procedure. *State v. Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985).

Article IV of the Arkansas Rules of Criminal Procedure sets forth the permissible limits of searches and seizures and governs the admissibility of seized evidence at criminal trials. Its roots lie in the fourth amendment to the United States Constitution; Article II, section 15 of the Arkansas Constitution; and judicial holdings interpreting and applying those provisions.<sup>8</sup> Article IV can be better understood if its underlying principles are understood. What follows is a look at the ways two of those principles have been expressed. The two principles are: First, that evidence seized in an unreasonable search should be excluded from criminal trials; second, that warrantless searches are presumed unreasonable, with a few specific exceptions. The court applied both these principles to reach its decision in *Anderson*.

The British colonists in North America had many complaints about their treatment by the Crown before the American Revolution. The source of some of those complaints was the use by colonial authorities of writs of assistance, which were general warrants giving officials broad powers to search persons, households, and effects. These abuses led to the adoption of the fourth amendment after the colonists gained independence from England.<sup>9</sup>

The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

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7. *State v. Anderson*, 284 Ark. 509, 683 S.W.2d 897 (1985).

8. See ARK. R. CRIM. P. commentary to article IV. Each rule in the Article is discussed with references to the constitutional provision and/or landmark court decision from which the rule was generated.

9. See A. CORNELIUS, *THE LAW OF SEARCH AND SEIZURE* 12-15 (1926); see also Note, *The Totality of the Circumstances Test for Determination of Probable Cause is Adopted*, 7 U.A.L.R. L.J. 645, 646 giving a more detailed history of general warrants and their abuses.

be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>10</sup>

The Arkansas Constitution contains the same provision in virtually identical language.<sup>11</sup>

Early cases dealt with a problem that still perplexes the courts: What should be done with evidence seized in an improper search? In *Boyd v. United States*,<sup>12</sup> the United States Supreme Court held that a federal customs statute was unconstitutional because it required one charged with its violation to produce incriminating papers. The Court held that this requirement violated the provisions of the fourth and fifth amendments. It violated the fifth amendment prohibition of compelled self-incrimination, and it violated the fourth amendment because compulsory production of private papers was equivalent to an impermissible search and seizure.<sup>13</sup> In addition, the Court held that the trial court's admission of the resulting evidence was unconstitutional.<sup>14</sup> The Court offered no additional rationale for exclusion of the evidence; exclusion may have rested on fifth amendment principles rather than on the fourth amendment.<sup>15</sup>

In 1914, the Court held in *Weeks v. United States*,<sup>16</sup> that a federal district court erred by admitting into evidence lottery tickets seized by local police officers and a federal marshal in an unreasonable search.<sup>17</sup> In the words of Justice Day, writing for a unanimous Court, exclusion of the evidence was justified because "[t]he efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."<sup>18</sup> The federal government and its agencies were thus denied use of evidence seized in violation of the fourth amendment. However, *Weeks* left open the question

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10. U.S. CONST. amend. IV.

11. ARK. CONST. art. II, § 15 includes language limiting its protection to people of this state; otherwise, it is identical to the fourth amendment.

12. 116 U.S. 616 (1885).

13. *Id.* at 622.

14. *Id.* at 638.

15. Since the fifth amendment is specifically concerned with coerced evidence and the Court based its holding on both amendments, further fourth amendment analysis was unnecessary.

16. 232 U.S. 383 (1914).

17. *Id.* at 398-99.

18. *Id.* at 393.

of whether the fourth amendment applied to state agencies.<sup>19</sup>

In 1949, in *Wolf v. Colorado*,<sup>20</sup> the Court was asked to extend the protection of the *Weeks* exclusionary rule to persons convicted in state courts of state offenses when evidence used in their trials would have been excluded in federal courts. Justice Frankfurter, speaking for the Court, refused to incorporate the fourth amendment into the due process clause of the fourteenth amendment. Justice Frankfurter agreed that the fourteenth amendment offered protection against unreasonable searches and seizures, but not because it extended fourth amendment prohibitions to the states. Instead, the fourteenth amendment offered protection to one's right of privacy, a right "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process clause."<sup>21</sup>

Justice Frankfurter went further, saying that the exclusionary rule applied in *Weeks* was not derived from the explicit requirements of the fourth amendment, but was a matter of judicial implication. It was only one of several means of enforcing the right to privacy. Other means might be more appropriate in state jurisdictions.<sup>22</sup> Therefore, the Court refused to apply the *Weeks* doctrine to state actions when equally effective state remedies existed.<sup>23</sup>

Justice Murphy dissented in *Wolf*, arguing that judicial exclusion of evidence was the only effective alternative available to deter violation of the search and seizure clause. It seemed unlikely to Justice Murphy that a district attorney would bring criminal charges against himself or his associates for well-meaning violations of the search and seizure clause of the fourth amendment. Civil remedies were illusory, since recoverable damages were likely to be minimal.<sup>24</sup>

At the time of the *Weeks* decision, and until at least 1959, Arkansas courts refused to consider the legality of a search as a factor in determining the admissibility of evidence. In 1896, the Arkansas Supreme Court held in *Starchman v. State*<sup>25</sup> that evidence was admissible in a criminal prosecution even if it was illegally obtained. Later cases

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19. *Id.* at 398-99.

20. 338 U.S. 25 (1949).

21. *Id.* at 27, 28 (quoting in part *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

22. *Wolf*, 338 U.S. at 28-33.

23. *Id.* Since *Wolf* left the states beyond the reach of the exclusionary rule, federal courts remained open to improperly seized evidence until 1960. They admitted evidence seized by state agents, if unassisted by federal agents, until *Elkins v. United States*, 364 U.S. 206 (1960).

24. *Wolf*, 338 U.S. at 42, 43 (Murphy, J., dissenting).

25. 62 Ark. 538, 36 S.W. 940 (1896).

followed the rule with little discussion.<sup>26</sup>

In *Clubb v. State*,<sup>27</sup> the Arkansas Supreme Court warned that it would consider applying an exclusionary rule similar to the federal rule in future cases. *Clubb*, however, was not a proper case for application of an exclusionary rule, since no proof was offered that evidence was improperly seized.<sup>28</sup>

The United States Supreme Court acted before the Arkansas Supreme Court had any further opportunity to create its own exclusionary rule. Two years after *Clubb*, in *Mapp v. Ohio*,<sup>29</sup> the Court overruled *Wolf v. Colorado* and held that evidence seized during an unreasonable search was inadmissible in a state court.<sup>30</sup> Justice Clark announced that the due process clause of the fourteenth amendment and the fourth amendment together "assure[d] . . . that no man is to be convicted on unconstitutional evidence."<sup>31</sup> Thus, "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."<sup>32</sup>

In both *Wolf* and *Mapp*, the pivotal issue was whether the exclusionary rule rested on a constitutional foundation. If the rule rested upon either the fourth, fifth, or fourteenth amendment, or various combinations of them, then the rule followed the rights granted by those amendments to all judicial forums, including state courts. If, instead, the rule was merely a judicially created rule of evidence based on remedial theories or considerations of judicial integrity,<sup>33</sup> then the rule applied only to federal courts through the Supreme Court's inherent supervisory power.<sup>34</sup> For the rule to be mandatory in state courts, it must have a constitutional foundation, since federal courts have no supervisory power over state courts. Thus, it was essential to the holding in *Mapp* that the rule have constitutional origins.

Arkansas applied the exclusionary rule beginning with *Ward v.*

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26. See, e.g., *Woolem v. State*, 179 Ark. 1119, 20 S.W.2d 185 (1929) (following *Starchman*); *Van Hook v. City of Helena*, 170 Ark. 1083, 282 S.W. 673 (1926) (implying that violation of article II, section 15 of the Arkansas Constitution could result in the exclusion of any evidence seized thereby); *Benson v. State*, 149 Ark. 633, 233 S.W. 758 (1921) (the legality of a search was not a factor to be considered in excluding evidence).

27. 230 Ark. 688, 326 S.W.2d 816 (1959).

28. *Id.*

29. 367 U.S. 643 (1961).

30. *Id.* at 653.

31. *Id.* at 657.

32. *Id.* at 655.

33. See *Elkins v. United States*, 364 U.S. 206, 222 (1960).

34. *Id.* at 206.

*State*<sup>35</sup> in 1967. Later decisions generally followed the governing federal holdings.<sup>36</sup>

In 1975, the Arkansas Supreme Court adopted the current Arkansas Rules of Criminal Procedure (effective January 1, 1976). Article IV of those rules in effect codified federal and state court holdings on search and seizure up until that date.<sup>37</sup> Article IV governs the issuance, content, and execution of warrants; lists and describes exceptional circumstances in which warrants are not required; requires that evidence seized in substantial violation of its provisions be suppressed; and provides guidelines for trial courts in disposing of motions to suppress. Article IV seems to recognize both a constitutional basis and a deterrence rationale for its exclusionary provisions. Rule 16.2(e) provides that "[a] motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state."<sup>38</sup> However, Rule 16.2(e) also provides: "In determining whether a violation is substantial the court shall consider all the circumstances, including: . . . (v) the extent to which exclusion will tend to prevent violations of these rules . . . ."<sup>39</sup>

Article IV also impliedly adopted the federal rule that a warrantless search is presumptively unreasonable, absent exceptional circumstances.<sup>40</sup> Comment I to Rule 16.2 provides grounds for suppression of evidence if the warrant under which it was seized is determined to be invalid.<sup>41</sup> However, if the warrant is determined to be invalid, the evidence may still be admitted if the search was authorized under an exception, such as a search incident to arrest.<sup>42</sup> No specific exception is provided, understandably, for a search made by a police officer who executes a defective warrant with an objective good faith belief that it is valid.

The foundation of the exclusionary rule was again the pivotal issue in the development of the good faith exception to the exclusionary rule

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35. 243 Ark. 472, 420 S.W.2d 540 (1967).

36. See, e.g., *Gibbs v. State*, 255 Ark. 997, 504 S.W.2d 719 (1974) (seizure of obscene material); *Cox v. State*, 254 Ark. 1, 491 S.W.2d 802, *cert. denied*, 414 U.S. 923 (1973) (plain view doctrine).

37. See ARK. R. CRIM. P. commentary to article IV.

38. ARK. R. CRIM. P. 16.2(e).

39. *Id.*

40. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Vale v. Louisiana*, 399 U.S. 30 (1970); *Katz v. United States*, 389 U.S. 347 (1967).

41. ARK. R. CRIM. P. 16.2 comment I.

42. *Id.*

in *Leon* and *Sheppard*. The *Mapp* decision had by no means settled the issue,<sup>43</sup> but seeds of the *Leon* and *Sheppard* holdings could be found in prior Supreme Court opinions<sup>44</sup> in which the Court expressed the view that the rule was primarily a court-created rule of evidence aimed at discouraging violation of the fourth amendment by police officers.<sup>45</sup> Therefore, before requiring exclusion of evidence, the Court would balance the costs of applying the rule against any likelihood of deterring police misconduct.<sup>46</sup> Dissenting Justices argued that the right to have illegally seized evidence excluded was part and parcel of a defendant's fourth amendment rights, and thus was personal in nature, not to be limited for the sake of convenience.<sup>47</sup>

Justice White first broached the possibility of a good faith exception to the exclusionary rule in his concurring opinion in *Illinois v. Gates*.<sup>48</sup> He argued that, if the primary justification for the exclusionary rule was to deter police misconduct, the rule should not be applied when it would have no deterrent value. For example, if a police officer executed a technically deficient warrant with an objective good faith belief that the warrant was valid, Justice White reasoned that no purpose would be served by excluding evidence obtained during a search under the defective warrant.<sup>49</sup>

Justice White wrote for the majority in *United States v. Leon*<sup>50</sup> and *Massachusetts v. Sheppard*.<sup>51</sup> In *Leon*, the Court held that evidence seized pursuant to a search warrant unsupported by probable cause should have been admitted at trial in federal court. Justice White noted that the question of the sufficiency of the affidavit supporting the warrant was a close one, and that the officer applying for and executing the warrant held an objectively reasonable belief that the warrant was valid.<sup>52</sup> He noted that indiscriminate application of the exclusionary rule would impede the truth-finding function of the courts, allowing

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43. An interesting question raised by the *Leon* decision is whether the *Mapp* holding itself is threatened. See *Stone v. Powell*, 428 U.S. 465, 537-38 (1976) (White, J., dissenting), in which Justice White expressed doubt that he could have voted with the majority in *Mapp*.

44. See *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Peltier*, 422 U.S. 531 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

45. *Stone v. Powell*, 428 U.S. at 484.

46. *Id.* at 487.

47. *Stone v. Powell*, 428 U.S. at 510 (Brennan, J., dissenting); *United States v. Calandra*, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting).

48. 462 U.S. 213, 246 (1983) (White, J., concurring).

49. *Id.* at 262.

50. 104 S. Ct. 3405 (1984).

51. 104 S. Ct. 3424 (1984).

52. *Leon*, 104 S. Ct. at 3423.



some guilty defendants to go free, and would foster disrespect for the law.<sup>53</sup> Balancing the costs of exclusion against the likelihood that exclusion would deter police misconduct in future similar circumstances, Justice White found that the costs outweighed the benefits.<sup>54</sup>

In *Sheppard*, the Court held that evidence seized pursuant to a search warrant which did not name the items to be seized with particularity should have been admitted at trial in state court. The officer had sought and received assurances from the magistrate that the warrant covered the items listed in his affidavit, when in fact it did not. The supporting affidavit was not incorporated into the warrant, but the officer restricted his search to the items listed in the affidavit. Again, the officer executing the warrant acted with the objectively reasonable belief that the warrant was valid.<sup>55</sup>

Justice White noted that the good faith exception would not apply if the search warrant was based on an affidavit that was knowingly or recklessly false, or was based on an affidavit that provided no substantial basis for a finding of probable cause, or if the magistrate abandoned his neutral and detached function in issuing the warrant.<sup>56</sup>

The Arkansas Supreme Court, in dicta, greeted the good faith exception with approval in several cases. In *McFarland v. State*,<sup>57</sup> the court held that a police officer's failure to return a warrant to the issuing judicial officer was neither willful nor substantial and caused the appellants no prejudice. Having held that the search was conducted pursuant to a valid warrant and that the violation was not substantial, the court nevertheless addressed *Leon* in dictum, noting that in light of *Leon* and *Sheppard*, it had no difficulty in finding that the officer had acted in good faith.

In *Lincoln v. State*,<sup>58</sup> the court held evidence seized under a search warrant admissible even though the affiant admitted that substantial parts of the information given by an informant were false. According to the court, the affidavit was sufficient without the false statements. Having thus determined that the search was conducted pursuant to a valid warrant, the court again noted that the officer had executed the warrant with a good faith belief that it was valid.

In *Toland v. State*,<sup>59</sup> the court upheld admission of evidence seized

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53. *Leon*, 104 S. Ct. at 3413.

54. *Id.* at 3421.

55. *Sheppard*, 104 S. Ct. at 3429.

56. *Leon*, 104 S. Ct. at 3421-22.

57. 284 Ark. 533, 684 S.W.2d 233 (1985).

58. 285 Ark. 107, 685 S.W.2d 166 (1985).

59. 285 Ark. 415, 688 S.W.2d 718 (1985).

pursuant to a warrant even though the directions given in the warrant to the location to be searched were impossible to follow, and the informant giving information was not even alleged to be reliable. Justice Purtle, writing for the court, agreed with the trial court that the warrant was valid (and thus the evidence admissible) under the totality of the circumstances test adopted in *Thompson v. State*.<sup>60</sup> Justice Purtle further noted that the evidence would be admissible under the good faith exception rule of *Leon* and *Sheppard*, since the officer executing the warrant knew the location to be searched and the items to be seized.

*State v. Anderson* is the first Arkansas case in which application of the rule in *Leon* would have been appropriate. Justice Hays, writing for the court, addressed the challenge to the validity of the search warrant. He noted that Rule 13.1(b) of the Arkansas Rules of Criminal Procedure requires either an affidavit or sworn, recorded testimony to support the issuance of a warrant.

Having determined that the search had been conducted pursuant to an invalid warrant, Justice Hays viewed the requirement of an affidavit or recorded testimony as a threshold requirement to be satisfied before the question of the police officer's good faith could be considered. Without such a requirement, the defendant would have no record upon which to base a challenge of the validity of a search warrant. The defendant would thus be denied a basic procedural safeguard, one that is independent of the requirement of probable cause for issuance of a search warrant.<sup>61</sup> Justice Hays further stated that even if the relaxed standards of *Leon* were applied, the search would still be unreasonable. Police officers are charged with knowledge of the requirements of the Arkansas Rules of Criminal Procedure, and failure to provide either an affidavit or recorded testimony could not be considered a good faith error.<sup>62</sup>

No doubt the requirement of an affidavit or recorded testimony is a substantial one. However, it is still a requirement that goes not to the reasonableness of the search, but to the validity of the warrant. Other warrantless searches provide no such procedural safeguards but are deemed reasonable because of exceptional circumstances.<sup>63</sup> Admittedly, without a written record it would be difficult to determine whether the

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60. 280 Ark. 265, 658 S.W.2d 350 (1983) (adopting the totality of the circumstances test set out in *Illinois v. Gates*, 462 U.S. 213 (1983)).

61. *State v. Anderson*, 286 Ark. at 62, 688 S.W.2d at 950.

62. *Id.* at 63, 688 S.W.2d at 950.

63. ARK. R. CRIM. P. art. IV.

search was based on probable cause. *Leon*, however, does not require a showing of probable cause. It requires only that the magistrate be detached and neutral, that he be given sufficient truthful evidence to make a determination of probable cause, and that the police officer have an objective good faith belief that the warrant he executes is valid.<sup>64</sup>

Application of the good faith exception in *Anderson* would have required a broad reading of *Leon*, something the court admitted it had been unwilling to do in the past.<sup>65</sup> However, the court could have provided guidance on whether Arkansas's exclusionary rule is based on constitutional considerations, a deterrence rationale, or both. As it turned out, *Anderson* offered little help to those wishing to predict the future of the good faith exception in Arkansas courts.

*Anderson* shows that, after *Leon*, search and seizure issues in state courts can no longer be decided on federal case law alone. The state constitution and rules of criminal procedure, because they no longer simply mirror federal case law, should and must be cited and interpreted before search and seizure issues can be decided.<sup>66</sup>

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64. See *Leon*, 104 S. Ct. at 3422. Courts were left to their discretion to decide either the good faith issue or the validity of the warrant, or both, depending upon the exigencies of the particular case.

65. *Anderson*, 286 Ark. at 61-63, 688 S.W.2d at 949.

66. In *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985), decided after *Anderson*, the Arkansas Supreme Court held that a search warrant was invalid because its supporting affidavit did not establish the time during which the criminal activity was observed. The court held that this shortcoming could not be cured by a police officer's good faith, even in light of *Leon* and *Sheppard*, because the affidavit's deficiency was apparent on its face. Issuance of a warrant based on such an affidavit violated the Arkansas Constitution. *Anderson* was cited as an indication of the court's unwillingness to read *Leon* and *Sheppard* broadly.